

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
HEWLETT PARK REALTY CO.	:	DETERMINATION
AND GARDEN TOWN REALTY CO.	:	DTA NOS. 809610
	:	AND 810168
for Revision of Determinations or for Refund	:	
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

Petitioners, Hewlett Park Realty Co. and Garden Town Realty Co., 107 Northern Boulevard, Great Neck, New York 11021, filed petitions for revision of determinations or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

On January 30, 1992 and February 10, 1992, respectively, petitioners appearing by Michael P. Sanchirico, Esq. and the Division of Taxation appearing by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel) consented to have the controversy determined on submission without hearing. On June 2, 1992, the Division of Taxation submitted documentary evidence. On June 10, 1992 and June 16, 1992, the respective parties executed a stipulation of agreed facts. The submission of briefs was delayed by settlement negotiations. On February 1, 1993, petitioners filed a memorandum of law. On March 23, 1993, the Division of Taxation filed a letter brief. Petitioners did not file a reply brief. After due consideration of the record, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners, both cooperative conversion sponsors who took back unsold shares from their respective cooperative housing corporations, are entitled to "step-up" their original purchase price to the value of the cooperative shares at the time of the respective transfers to the cooperative housing corporations or whether each petitioner's original purchase price was

properly determined by the Division of Taxation.

FINDINGS OF FACT

On June 10, 1992 and June 16, 1992, respectively, the parties, by their respective representatives, executed a stipulation of agreed facts. Said stipulation, which was submitted into the record herein, is reproduced here in its entirety as Findings of Fact "1" through "22" with minor editing for clarification and consolidation.

Hewlett Park Realty Co.

Petitioner Hewlett Park Realty Co. ("Hewlett Park") is a partnership formed under the laws of the State of New York.

Hewlett Park was the sponsor of an offering plan to convert Hewlett Park Apartments, 1355-1395 Broadway, Hewlett, New York, to cooperative ownership (the "Hewlett Plan"). The approximate date of the first offering under the plan was November 12, 1980.

Hewlett Park acquired the premises on January 26, 1977 for consideration of \$1,291,413.42.

On June 1, 1981 (the "Closing Date"), Hewlett Park transferred title to the premises to Hewlett Park Apartment Owners, Inc. (the "Hewlett Park Cooperative"), the cooperative corporation, pursuant to the terms of the plan.

At the time of the transfer of title from Hewlett Park to the Hewlett Park Cooperative, out of a total of 23,480 shares, there were 12,871 unsold shares which were then being offered to nontenants at a price of \$200.00 per share cash plus an aggregate mortgage allocation of \$712,619.25 (12,871 divided by 23,480 x \$1,300,000.00).

On March 28, 1983, there were 4,635 unsold shares.

The Closing Report reflects that the shares unsold as of the Closing Date were purchased by Hewlett Park for the tenants' price of \$100.00 per share.

The Division of Taxation ("Division") determined Hewlett Park's original purchase price using the price it originally paid to acquire the property and the amount it paid for capital improvements, conversion costs and other acquisition costs. The Division did not compute

Hewlett Park's original purchase price using the value of the shares it took back on June 1, 1981.

Garden Town Realty Co.

Petitioner Garden Town Realty Co. ("Garden Town") is a partnership formed under the laws of the State of New York.

Garden Town was the sponsor of an offering plan to convert Garden Town Apartments, 1193-1215 East Broadway, Hewlett, New York to cooperative ownership (the "Garden Town Plan"). The approximate date of the first offering under the plan was April 26, 1982.

Garden Town acquired the property in 1977 for consideration of \$2,195,627.00.

On January 11, 1983 (the "Closing Date"), Garden Town transferred title to the premises at 1195-1215 East Broadway to Garden Town Apartment Owners, Inc. (the "Garden Town Cooperative"), the cooperative corporation, pursuant to the terms of the plan.

At the time of the transfer of title from Garden Town to the Garden Town Cooperative, out of a total of 49,950 shares, there were 39,045 unsold shares in the Garden Town Cooperative which were then being offered to nontenants at a price of \$200.00 per share cash plus an aggregate mortgage allocation of \$1,563,363.36 (39,045 divided by 49,950 x \$2,000,000.00).

On March 28, 1983, there were 25,920 unsold shares.

The Closing Report reflects that the shares unsold as of the Closing Date were purchased by Garden Town for the tenants' price of \$100.00 per share.

The Division determined Garden Town's original purchase price using the price it originally paid to acquire the property and the amount it paid for capital improvements, conversion costs and other acquisition costs. The Division did not compute Garden Town's original purchase price using the value of the shares it took back on January 11, 1983.

Additional Stipulated Facts

Neither Hewlett Park nor Garden Town had filed returns with the Department of Taxation and Finance pursuant to Article 31-B of the Tax Law until an audit was commenced

by the Division. No gains tax has been paid.

At no time did Hewlett Park or Garden Town liquidate and/or distribute any unsold shares to their partners.

Both Hewlett Park and Garden Town have had conciliation conferences which resulted in the issuance of conciliation orders. The Conciliation Order for Hewlett Park fully sustained the Notice of Determination (see, Finding of Fact "23"). The Conciliation Order for Garden Town modified the Notice of Determination (see, Finding of Fact "24").

Neither Hewlett Park nor Garden Town contest the conciliation orders and the underlying notices of determination (the modified Notice of Determination in the case of Garden Town) as to the computation of tax, interest and penalties due.

It is agreed that should a determination or decision be rendered in favor of petitioners, the matter will be remanded to the Division to make the appropriate adjustment to the tax, interest and penalties asserted in the notices of determination and conciliation orders.

The issue in this proceeding is whether each petitioner is entitled to "step-up" its original purchase price to the value of the cooperative shares at the time of the respective transfers to the cooperative housing corporations as set forth in 20 NYCRR 590.35(f) or whether each petitioner's original purchase price was properly determined by the Division.

Additional Facts

On September 25, 1989, the Division issued to petitioner Hewlett Park a Notice of Determination under Article 31-B of the Tax Law which assessed \$72,682.76 in gains tax due, plus interest and penalty. Said notice was sustained by a Conciliation Order dated May 3, 1991.

Also on September 25, 1989, the Division issued to petitioner Garden Town a Notice of Determination under Article 31-B of the Tax Law which assessed \$325,532.17 in gains tax due, plus interest and penalty. Pursuant to a Conciliation Order dated October 25, 1991, the statutory notice was recomputed to \$271,467.08 in gains tax due, plus penalty and interest.

CONCLUSIONS OF LAW

A. Tax Law § 1441, which became effective March 28, 1983, imposes a tax at the rate of 10% on gains derived from the transfer of real property within New York State. Tax Law § 1440(3) defines "gain" as "the difference between the consideration for the transfer of real property and the original purchase price for the property." Tax Law § 1440(5)(a) defines "original purchase price" as, generally, the consideration paid or required to be paid by the transferor to acquire the interest in real property, plus the cost of certain improvements and customary expenses as set forth in the statute.

B. The dispute in the instant matter lies in the Division's determination of petitioners' respective original purchase prices in their respective interests in real property. Specifically, the Division determined each petitioners' original purchase price using the price that each petitioner originally paid to acquire the property, plus the amount paid for capital improvements, conversion costs and other acquisition costs. The Division did not compute each petitioner's respective original purchase price using the value of the shares each took back on its respective closing date. Petitioners contended that the Division's determination was improper, and that each petitioner's original purchase price should properly have been computed using the value of the shares each petitioner took back on its respective closing date.

C. With respect to cooperative conversions, it is well established that:

"[T]he gains tax is imposed by the statute upon the overall cooperative conversion plan The corporation [is] merely a conduit through which ownership of individual units could be transferred by [the sponsor] to the purchasers through the sale of shares [T]he making of a contract of sale for the transfer of the real property from a sponsor to an apartment corporation is not a taxable event separable for gains tax purposes from the overall conversion." (1230 Park Avenue Assoc. v. Commr., 170 AD2d 842, 566 NYS2d 557, 959, lv denied 78 NY2d 859, 575 NYS2d 455, citing Mayblum v. Chu, 109 AD2d 782, 486 NYS2d 89, mod 67 NY2d 1008, 503 NYS2d 316.)

D. Pursuant to these general principles, the statutory provisions relating to the conversion process make share transfers to the ultimate unit purchasers the key event in the cooperative conversion process, for it is at this point that the aim of the conversion plan is achieved (see, e.g., Tax Law § 1442 [which requires payment of tax on the date of transfer of each apartment

unit]; Tax Law § 1443[6] [which specifically makes a written agreement for the purchase of shares in a cooperative corporation the "written contract" for purposes of the so-called grandfather exemption]).

E. It follows from the foregoing that a transfer of unsold shares from the cooperative housing corporation back to the sponsor for sale to prospective unit owners, such as occurred herein, would likewise be a nontaxable event for gains tax purposes (see, 20 NYCRR 590.35[d]). It further follows that where, as here, the sponsor, having acquired unsold shares from the corporation in a nontaxable transfer, would have a carryover original purchase price in the shares (see, 1230 Park Avenue Assoc. v. Commr., supra; Matter of 61 East 86th Street Equities Group, Tax Appeals Tribunal, January 21, 1993; Matter of Birchwood Assoc., Tax Appeals Tribunal, July 27, 1989; Matter of Normandy Assoc., Tax Appeals Tribunal, March 23, 1989).

F. In accordance with the foregoing, the Division's calculation of petitioners' respective original purchase prices was proper. Indeed, petitioners acknowledge in their memorandum that the Division's computation of their respective original purchase prices was consistent with the cases cited above. Petitioners contend, however, that each should properly receive a stepped-up original purchase price pursuant to the second paragraph of 20 NYCRR 590.35(f).¹ Petitioners

¹20 NYCRR 590.35 provides, in relevant part:

"Question: Which transfers of cooperative shares by the person who transfers an interest in real property to the cooperative housing corporation (the realty transferor) or by the owners of the realty transferor, or by the cooperative corporation itself, require payment of tax?

* * *

"(f) Transfers by the realty transferor to its owners?

"Answer: No, if the realty transferor is a partnership, corporation, or other entity and transfers the shares to its owners, for investment or resale, in proportion to their respective ownership interests in the entity, these transfers will not require payment of tax. This result applies whether the owners hold the shares jointly or individually, provided that the owners do not take the shares as tenant stockholders.

contended that the transfer described in this regulation, a transfer from the realty transferor (sponsor) to its owners, was a mere change of identity of ownership with no change of beneficial interest and yet the regulations permit a step-up in original purchase price with respect to such transaction (see, contra, 20 NYCRR 590.50[a][3]). Petitioners contended that the transfers in dispute herein, from the cooperative housing corporation back to the sponsor (or realty transferor), were no less or more of a beneficial transfer than the transfer described in the regulation and that therefore the transfers herein should be accorded similar treatment.

Petitioners contended that they

should not be denied a stepped-up original purchase price where certain other pre-March 1983 transfers were allowed a stepped-up original purchase price. Petitioners acknowledged that the relevant case law supports the Division's assertion of a carryover original purchase price herein and further stated that the exception to the general rule noted above "appears to have no rational basis, either in law or in fact."

G. Petitioners' contentions are rejected. First, as previously discussed and as petitioners concede, the relevant case law supports the Division's position. Second, the transfer described in the regulation is not the same as the transfers at issue herein. Consequently, the regulation is inapposite to petitioners' position. As to the disparate treatment accorded certain pre-March 1983 transfers, petitioners have not established either that the Division's regulation is irrational or that their interpretation of the statute is the only reasonable one (see, Blue Spruce Farms v. State Tax Commn., 99 AD2d 867, 472 NYS2d 744, 745, affd 64 NY2d 682, 485 NYS2d 526).

Following transfers to the owners of the realty transferor which do not require payment of tax, the owners hold the shares in the place of the realty transferor and their total original purchase price is equal to that of the realty transferor's immediately before the transfer.

"Where the transfers to the owners of the realty transferor took place before March 29, 1983, the owners will have an original purchase price in the shares based on the value of the shares at the time of the transfers."

Nor have petitioners shown (or even attempted to show) that the Division's regulation constitutes "invidious discrimination" (see, Trump v. Chu, 489 NYS2d 455, 459, 65 NY2d 20).

H. In their respective petitions, petitioners contended that since the transfers to the cooperative housing corporations occurred before the enactment of the gains tax, i.e., March 28, 1983, then the subject transfers should be exempt from gains tax. This issue was rejected by the court in Mayblum v. Chu (supra) and is rejected herein.

I. The petitions of Hewlett Park Realty Co. and Garden Town Realty Co. are in all respects denied. The Notice of Determination issued to Hewlett Park Realty Co., dated September 25, 1989, is sustained. The Notice of Determination issued to Garden Town Realty Co., dated September 25, 1989, as modified by the Conciliation Order, dated October 25, 1991, is also sustained.

DATED: Troy, New York
July 22, 1993

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE